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No. 80-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., *Appellants*,

v.

STATE OF INDIANA, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Indiana

BRIEF OF THE NATIONAL LEAGUE OF CITIES AND THE STATES OF ARIZONA, HAWAII, KANSAS, LOUISIANA AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE MOTION TO AFFIRM

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QUESTIONS PRESENTED

The legal issues of particular concern to the *amici* are:

1. Whether the prime farmlands provisions and procedures in Title V of the Surface Mining Control and Reclamation Act of 1977 (the "Act") §§ 501-529, 30 U.S.C.A. §§ 1251-79 (Supp. 1980) exceed Congress' powers under the Commerce Clause of Article I, Section 8, of the Constitution, and

2. Whether the same provisions violate the Tenth Amendment.

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* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company, and John A. Conlon.

INTERESTS OF AMICI CURIAE

This *amicus curiae brief* of the National League of Cities and the States of Arizona, Hawaii, Kansas, Louisiana and Utah as *amici curiae* is submitted with the written consent of all the parties. The letters of consent are on file with the Clerk. Rule 36.1. With respect to the States, consent is not required. Rule 36.4.

The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this latter capacity that NLC offers their views in the case at bar.

Joining with the NLC on this *amicus curiae* brief are the States of Arizona, Hawaii, Kansas, Louisiana and Utah. The States, having continually exercised their powers tc regulate the use of private nonfederal lands within their borders, have a compelling interest in preserving these integral functions.

The States' and NLC's interest in this appeal is predominantly in the question of the extent to which the federal government is authorized to undertake zoning and land use regulation, activities which traditionally are local and community-oriented in nature and historically the responsibility and the prerogative

of state and local governments. At issue are the circumstances, if any, or the extent to which the federal government can control the use of nongovernment prime farmlands and require state government structures and procedures for land use planning and control under the provisions of Title V of the Surface Mining Control and Reclamation Act of 1977 (the "Act"), §§ 501-29, 30 U.S.C.A. §§ 1251-79 (Supp. 1980).

The relevant provisions of the Statute deal with surface mining on prime farmlands and involve, among other things, mining on prime farmlands, the handling and replacement of topsoil during and after surface mining operations, the restoration of mined lands to their approximate original contour, the governmental structures and procedures for designation of certain lands as unsuitable for surface mining, and the premining administrative review of proposed postmining land use.

The Court below concluded that various portions of Title V of the Surface Mining Control and Reclamation Act of 1977 exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment and declared these provisions to be invalid. The *amici* urge that these decisions of the Court be affirmed.

The Constitutional questions presented in this appeal are raised in the context of the Act, but from the viewpoint of the states and municipalities there are underlying questions which are more far reaching than

the regulation of surface mining. These issues involve the role of states in the federal system as contemplated and protected by the Constitution, and address the Constitutionally mandated organizing principles which govern or should govern the structure and operation of that federal system in which state and local governments must function and discharge their responsibilities.

Stated very succinctly, it is the perception of the *amici* that the cumulative changes in our federal system over the past several decades have not adequately been guided or constrained by any ascertainable organizing principles whatsoever—Constitutional or otherwise. Consequently, in the view of the *amici,* the performance of our federal governmental system has suffered. It has become an increasingly disfunctional form of federalism. Among other obvious deficiencies, contemporary intergovernmental relations have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly, and above all, more unaccountable.[1] In today's federal system, the answer

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[1] These conclusions are shared, among others, by the Advisory Commission on Intergovernmental Relations which is concluding a study in depth of the federal role in the federal system. For example:

> Over the past twenty years the federal role has become *bigger, broader,* and *deeper*—bigger within the federal system, in the size of its intergovernmental outlays, and in the number of grant programs; broader in its program and policy concerns; and deeper in its regulatory thrusts, preemption proclivities, and the wide range of subnational governments interacting directly with Washington. This is the broad summary conclusion that emerges from this ten volume study and it points to a growing centralization of policymaking. Yet, perhaps surprisingly, this conclusion does *not* produce a com-

grows more vague as to which level of government is in charge of what governmental authority.

In part, it was this equivocal obscurement of responsibility and the associated need for more concise and effective concepts of organization and accountability which in the 1970's energized the NLC, eighteen states and other concerned parties into an active defense of state (and local) government sovereignty against the incursions of the federal government manifested by Congress' efforts to set wage and hour conditions for state and local government employees. In 1976 this Court's ruling in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) was one of the consequences of these efforts. In that case, this Court enunciated the outlines of some Constitutionally mandated organizing principles which if followed in the future would do much to foster and protect the effectiveness of the federal system. But even that ruling continues to be attacked. *See, e.g., Amersbach* v. *Cleveland,* 598 F.2d 1033 (6th Cir. 1979).

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panion generalization that the system's *delivery of services* is infinitely more centralized than its predecessor of a generation ago. What *is* certain is that the current labyrinth of countless intergovernmental relationships—with their multiple vertical, diagonal, curving, and haphazardly horizontal connections—is far more dysfunctional than that of 1960.

The contrasts, then, between the "systems" of 1960 and 1980 are stark, but the continuities between them, along with perplexing paradoxes in both, leave us with an open debate over whether we still have a noncentralized system but with a general consensus that it does not function well. X ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *The Federal Role in the Federal System: The Dynamics of Growth,* in AMERICAN FEDERALISM 1960-1980: CONTRASTS AND CONTINUITIES (A-86) (publication forthcoming U.S. Government Printing Office)

In the 1980's it is increasingly clear that the principles which led this Court to its conclusions in *National League of Cities,* require reiteration and perhaps clarification as well. In the view of the *amici* the case at bar demonstrates the continuing need to declare limits to the powers under the Commerce Clause when the use of such authorities by Congress jeopardizes the ability of state and local governments to function in the federal system as the Constitution contemplates and mandates. At issue is the efficacy of the nation's system of governance.

SUMMARY OF ARGUMENT

The prime farmlands provisions and other provisions of Title V of the Act as the District Court found, are directed at the use of land and regulate and control the use of land as distinguished from regulating commerce. The provisions of Title V, therefore, exceed Congress' powers under the Constitution in two respects.

Land use controls and planning are a traditional exercise of states' police powers in the interests of public welfare. As such, the regulation of the use of land represents an essential and integral function of state governments. Moreover, in our system of dual sovereignty, state and local land use controls provide the means for the residents of municipalities to express their values and needs and to influence through state and local governments' political systems the future character of their community.

The provisions of Title V of the Act control the use of land and the state government procedures for land use planning. As such they are an exercise of

police powers which are reserved to the states under the Tenth Amendment and are, therefore, beyond the authority of the federal government.

In addition, to the extent that the prime farmlands provisions may be an exercise of the commerce powers, these powers under the Constitution must be constrained as an improper impairment of the ability of states to carry on traditional and integral state functions as these are contemplated by the federal system.

Accordingly, the decisions of the District Court should be affirmed.

ARGUMENT

1. POLICE POWERS ARE BASIC AUTHORITIES RESERVED TO THE STATES; REGULATING LAND USE IN THE PUBLIC INTEREST IS AN EXERCISE OF POLICE POWERS; THE LAND USE RESTRICTIONS IN TITLE V OF THE ACT CONSTITUTE AN EXERCISE OF POLICE POWERS AND ARE BEYOND THE AUTHORITY OF THE FEDERAL GOVERNMENT

Given the particular concern of the *amici* for the ability of states and municipalities to function effectively in the federal system, the *amici* urge that a central question before this Court is the extent of the authority of the federal government, if any, to engage in land use regulation, an activity which traditionally has been an exclusive and central responsibility of state and local governments.

Chief Justice Marshall remarked on the existence in the states of a panoply of legislative powers available for the protection of their welfare and the promotion of local interests: "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surren-

dered to the general government; all which can be most advantageously exercised by the states themselves." *Gibbons* v. *Ogden,* 22 U.S. 1, 203 (9 Wheat.) (1824). And three years later, Justice Marshall distinguished this state legislative authority as the police powers. *Brown* v. *Maryland,* 25 U.S. 419, 444 (12 Wheat.) (1827).

The aims and aspirations of state governments—to which ends the police powers constitute the principal means—have been delineated over the years by our courts. For example, Justice Barbour wrote:

> Let us see what powers are left with the States. The Federalist, in the 45th number, speaking of this subject, says; the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.
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> . . . [I]t is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive. *New York* v. *Miln,* 36 U.S. 102, 133, 139 (11 Pet.) (1837).

While the conclusions of the Court in this case with respect to "intrastate commerce" are no longer authoritative, the language cited above would seem still valid as a description of the critical relationships which still exist today between the police powers and the responsibilities and aspirations of state governments to provide for the welfare of their citizens.

Regulation of land use in the interests of the public welfare has been and remains a primary and traditional means whereby state and local governments exercising their police powers, seek to improve the circumstances of their residents. The principles embodied in zoning ordinances have been spelled out by this Court:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.
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> . . . .
>
> . . . [T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines. *Village of Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 387, 389 (1926).

The propositions set out in *Euclid* have since been reiterated in many decisions in support of state land use controls. Planning and zoning as a means of in-

fluencing the present and future physical development of a community in order to promote social and economic well-being has become a traditional and integral function of state and local governments. *Warth* v. *Seldin,* 422 U.S. 490 (1975). It is a method whereby state and local governments offer individual citizens a means to express their values through the political system and thereby to decree how their communities should develop and grow.

In the view of the *amici,* the requirements of Title V of the Act dealing with surface mining on prime farmlands conflict directly with the laws and the tradition that land use controls are the exclusive prerogatives of state governments and the police powers reserved to them. We understand, of course, that federal powers under the Commerce Clause can coexist with state police powers and that "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby,* 312 U.S. 100, 114 (1941). But the provisions of Title V of the Act under attack here present some distinguishing circumstances.

For the reasons set out at length in its opinion, the court below has concluded that the prime farmland provisions are directed at aspects of surface coal mining which have no substantial or adverse effect on interstate commerce and that, in fact, those same provisions represent land use controls and planning decisions which are intended by the Act to be imposed upon the states. The *amici* agree.

So far as the case at bar is concerned, the prime farmlands provisions and procedures reflect the acts

of the federal government, not as a regulator of commerce among the states as exemplified by commercial mining, but rather as a promulgator of what Senator Byrd (as quoted in the opinion of the court below) describes as "environmental values". *Indiana* v. *Andrus,* No. IP 78-500-C (S.D. Ind. June 10, 1980). These are applied by the federal government to prime farmlands. Under federal precepts and value systems, prime farmlands have special intrinsic worth—apart from their commercial value—which must be protected by federal laws and regulations which, according to the trial court, amount to land use controls. The focus and thrust of the federal regulation is on the land itself—and not on commerce. While controls on the use of lands can affect indirectly the activities of commerce, to regulate the former is quite another matter than the regulation of commerce.

The court below has rightly concluded that Congress lacks the authority to decree such land use controls. The federal government has no police power; this authority was reserved to the states by the Tenth Amendment. Accordingly, to uphold the land use control implicit in Title V of the Act, the United States must exact some other Constitutional power. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U.S. 146 (1919). But a Constitutional power to decree and apply "environmental values" to the uses of land as in this case is totally lacking. The decision of the lower court should be affirmed.

Implicit in the statutory scheme under attack here is a federal aspiration to use the commerce powers as police powers to coerce the states and to undermine existing state authority and procedures which under our system of dual sovereignty offer individual com-

munities a voice in the decisions involving land use. To hold that the Constitution authorizes such federal power would be to change radically the nature of our federal system and the role and responsibilities of state governments within that system. This should not be done.

2. LAND USE REGULATION IS AN INTEGRAL FUNCTION OF STATE AND LOCAL GOVERNMENTS; CONGRESS MAY NOT USE THE COMMERCE CLAUSE TO MANDATE FEDERAL CHOICES WHICH IMPAIR BASIC STATE AND LOCAL GOVERNMENT FUNCTIONS

The *amici* here urge that even if this Court should find in the Commerce Clause some color of Constitutional authority to support the enactment of Title V of the Act, such use of the federal authority to regulate commerce must be restrained as an unacceptable impairment of state sovereignty and the ability of states to function within the federal system as contemplated by the Constitution and exemplified by the Tenth Amendment.

In the first part of its argument, the *amici* have suggested that the fundamental purpose, indeed the essence of state government, is to advance the safety, happiness, and prosperity of its people and thereby to provide for the general welfare, *Miln*. And further, that zoning, land use planning and control to achieve these ends are basic and integral functions of state and local governments, *Euclid* and *Seldin*. Indeed, as recognized by this Court in these and other cases, there is a functional relationship between the states' positive responsibility to protect and enhance the well-being of its citizens, their use of the police powers to these ends, and land use controls as a traditional means to

achieve these fundamental aims. *See: Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978); *Agins* v. *Tiburon,* —— U.S. ——, 100 S. Ct. 2138 (1980); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915).

Accordingly, as demonstrated above, land use control and planning have been and are traditional state governmental activities involving essential decisions as to the conduct of integral functions carried on by states in their sovereign capacities. And the controls of these essential state decisions which Congress sought to wield under Title V of the Act, if permitted, would jeopardize states' ability to function within the federal system as contemplated and protected by the Constitution.

In the case at bar, the trial court found only the most tenuous relationship at best between the regulation of commerce and the requirements of Title V of the Act with respect to the use of prime farmlands. Nevertheless, the government relies, as it must, on the Commerce Clause as authority for the enactment of Title V. The issue presented, therefore, is whether this resort to the commerce power is constrained by Constitutional considerations from the uses contemplated under Title V. We believe that because of the principles set out in *National League of Cities* the answer is affirmative; this use of the commerce powers must be curtailed.

As noted in *National League of Cities,* this Court has "repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative

authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845. The standard, in judging between permissible and impermissible federal regulation, is whether there is federal interference with "functions essential to separate and independent existence." 426 U.S. at 845. In the context of the case at bar, state and local decisions with respect to the shape, growth, character, and industrial mix of individual communities within the state involve essential aspects of their "freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. at 852.

In *National League of Cities,* the Court defined traditional functions as "typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. Zoning and land use planning are the basic and essential means available to state and local governments, utilizing their police powers to control and shape the physical and economic development of a given community in order to promote social and economic well-being for its citizens. And in the aggregate, community-oriented land use controls shape the future of the entire state. This governmental function is, as we have said, the essence of state governance and as such should be held to be beyond the reach of the Commerce Clause impairment contemplated by the land use regulations of Title V of the Act. Consequently, the *amici* urge that the decision of the lower court be affirmed.

In this context, and given the fundamental importance to state governments of land use regulation as a means of protecting its citizens and shaping the

states' future, it seems appropriate to note again that the lower court found that "surface coal mining operations on prime farmlands, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce." *Indiana* v. *Andrus*, No. IP 78-500-C, 10 (S.D. Ind. June 10, 1980). When compared with the extent of impairment of essential state functions which the Act contemplates, in contrast with the traditionally local quality of state and local land use regulation, and considering the importance of the state functions being undermined, and taking into account the value of keeping land use decisions as close as possible to the citizens most directly affected, and considering the alternative means which are available to achieve the national aims expressed in and through the prime farmlands provisions of the Act, the *amici* urge this Court that the federal aims expressed in and through these prime farmlands provisions do not justify the kind of interference with state sovereignty which this federal law contemplates.

Whether one regards the nature and the extent of the impairment of state sovereignty involved here or one balances the character of the federal and state interests involved, the conclusions of the court below seem correct and should be affirmed.

CONCLUSION

The opinions of the *amici* urged upon this Court should not be construed as reflecting their views of the problems, both national and statewide, associated with surface mining. Rather, the aim of this *amicus curiae* brief is to alert this Court to the dangers for states and municipalities implicit in the wrong disposition

of the Constitutional questions before this Court. In a very real sense at issue is the continuing viability of the federal system contemplated by the Constitution and the sovereignty of the states within that system.

It is not the aim of the *amici* to turn back the clock, to return to the precepts of *Hammer* v. *Dagenhart,* 247 U.S. 251 (1918) in lieu of the scope of *United States* v. *Darby,* 312 U.S. 100 (1941). But this brief could be construed, at least in part, as an attack on the legislative mode embodied in Title V of the Surface Mining Control and Reclamation Act. It is typically intrusive and coercive. It seeks to impose on the states the federal will and the federal standards without regard to costs or consequences to the states. The methods which Congress has chosen to pursue its federal interests is a bad method because, among other reasons, the statute has been enacted, it seems, without a manifest concern for the requirements of state sovereignty. The Act demonstrates a lack of appreciation for the need to protect and foster a federal system in which state governments retain their attributes of sovereignty and thereby their ability to discharge their Constitutional responsibilities within that system.

From the viewpoint of the *amici* the immediate substantive issue before this Court is whether under the Commerce Clause authority, the federal government can regulate the use of land as a means of regulating commerce. In the case at hand, the federal government is prepared to assume an active and presumably a superior role over states in decreeing land use controls on a national basis in the interests of "environmental values" or whatever else the federal government may associate with "commerce". With any encouragement

from this Court, the *amici* anticipate that federally mandated land use standards and controls in very short order will become a feature of the federal system of governance.[2]

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[2] This conclusion of the *amici* is based on something more than argumentative conjecture. For example: there are many similarities in legislative methods between Title V of the Act and the Clean Air Act, 42 U.S.C.A. § 7401, *et seq.* (Supp. 1980). The report of the Senate Committee on Environment and Public Works on the Clean Air Amendments of 1977 in discussing "Implementation Provisions" includes the following observations, among others, on land use:

> In the Clean Air Amendments of 1970, the Congress included specific reference to controls on the uses of land as a strategy supplemental to emission limitations in the achievement of ambient air quality standards. It was recognized then that such land use strategies could become particularly effective in the maintenance of clean air and prevention of further deterioration of dirty air.
>
> . . . .
>
> The committee therefore, deemed it appropriate that land use control could be included as a technique for preventing further deterioration. . . .
>
> EPA has promulgated land use regulations. This bill places that EPA authority in a new perspective, precluding any required land use controls for other than maintenance of primary air quality standards. . . .
>
> . . . .
>
> EPA may only impose land-use controls under this bill when a State implementation plan does not provide authority to. . . . S. REP. No. 127, 95th Cong., 1st Sess. 25, 26 (1977).

In sum, the Senate Committee evinced no doubt about the authority of the federal government to resort to land use regulations, but thought its use should be restricted to those instances where its use was necessary and appropriate.

The reference to "land use" in the "Implementation Plans" was deleted in conference at the instigation of the House "because of its vagueness". H.R. REP. No. 564, 95th Cong., 1st Sess. 125, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1506. But land use regulation continues to be considered as a part of EPA's methodology.

It is for just these reasons that the *amici* suggest that this Court view the issues before it less as an exquisite question of the ultimate extension of the commerce power and more in terms of the practical organizing principles reflected in the Constitution and the Tenth Amendment. Adherence to these principles is necessary if the federal system is to continue to work effectively in the interests of all the people. The workability of the federal system is the ultimate issue before this Court. For all these reasons, the *amici* urge respectfully that the decisions of the court below be affirmed.

Respectfully submitted,

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